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JUL 21 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

July 18, 1997

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**BY HAND**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

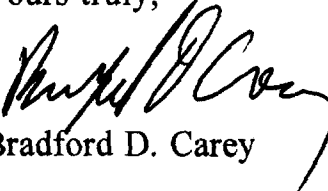
RE: In Re: Petition for Allotment of Additional Frequencies  
Direct Broadcast Satellite Service  
FCC Rm No. 9118  
*Opposition to Allotment and Petition to Deny*

Dear Mr. Caton:

Enclosed please find the original and sixteen (16) copies of an  
Opposition to Allotment and Petition to Deny for filing with the Commission  
in connection with the above-captioned.

If you should have any questions regarding this matter, kindly direct  
them to the undersigned.

Yours truly,

  
Bradford D. Carey

BDC/mv  
Enclosures

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Before the  
**Federal Communications Commission**  
Washington, D. C.

**RECEIVED**

JUL 21 1997

In Re:

Petition for  
Allotment of Additional Frequencies  
Direct Broadcast Satellite Service

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

FCC Rm No. 9118

**OPPOSITION TO ALLOTMENT  
and  
PETITION TO DENY  
OF BRADFORD D. CAREY**

BRADFORD D. CAREY  
HARDY & CAREY, L.L.P.  
111 Veterans Memorial Boulevard  
Suite 255  
Metairie, Louisiana 70005  
(504) 830-4646

**OPPOSITION TO ALLOTMENT  
AND  
PETITION TO DENY  
OF BRADFORD D. CAREY**

Bradford D. Carey hereby states his Opposition to the Allotment of Additional Frequencies (and/or orbital locations) for Direct Broadcast Satellite Service ("DBS") for Hughes Electronics Corp. and Direct TV Enterprises, Inc. (together "Hughes") and/or United States Satellite Broadcasting Company, Inc. ("USSB") and further Petitions to Deny applications and/or other requests for same.<sup>1</sup> As set forth below, the assignment of additional frequencies (or orbital locations) to Hughes and/or Hubbard would be contrary to the public interest.

Presently, Hughes and Hubbard operate their systems together, amassing a greater pool of frequencies that appear as one orbital allotment to receiving dishes than either could have alone. The programming offered by the two is complementary and available in various packages. The two do not in general offer the same programming except for, perhaps, some "basic cable" type services. Thus, the two operate as a combine, rather than in competition with each other.

**I THE JOINT OPERATION IS ANTI-COMPETITIVE.**

The present combined joint operation is anti-competitive. Rather than compete with each other, the two have combined to operate a system with more channels than either could have alone. With their joint "channel mapping"

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<sup>1</sup>By Public Notice, Report No. 2208, the FCC gave notice of a request for allocation of additional spectrum filed by Direct TV Enterprises, Inc.

scheme, they are able to list literally hundreds of channels (not all of which are in operation at any given time), some of which appear to use the same frequency under various channel names and numbers. The system is, without a doubt, well thought out and efficient.

However, because the two operate a joint system rather than competitive systems, customers must deal with the two companies under the terms of their joint agreements. Customers apparently can not negotiate with either company alone. Moreover, it appears that one company will not issue an "access card"<sup>2</sup> if a customer has one, or has previously had one, authorized by the other. Thus, a customer that had an access card authorized by Hubbard can not get one from Hughes,<sup>3</sup> according to Hughes customer service personnel .

On or about December 28, 1996, the undersigned installed a new DSS dish at his home.<sup>4</sup> As part of the set-up procedure, a telephone call was made to

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<sup>2</sup>An access card is a credit card like device with one or more computer chips embedded therein. It can be programmed by signals received through the DSS dish or over telephone lines to permit operation of the receiver on various channels, and to block out channels and/or programs for which the receiver is not authorized.

<sup>3</sup>Much of the factual background has been derived from attempts of the petitioner and others to have the petitioner's service restored after it was terminated by the DSS computer at the beginning of July, 1997 not withstanding that **in January, 1997 a full year's service was prepaid!**

<sup>4</sup>While the account was being established over the telephone, a question was raised by Hughes personnel as to whether or not the equipment was new. According to Hughes personnel, the access card had previously been authorized. It was explained to Hughes personnel that the equipment had been purchased as new, except it had been sold by the retailer to a purchaser who returned it as having a minor cosmetic problem. Ultimately, Hughes personnel were satisfied that the dish was new and authorized the access card for the requested "Total

Hughes to establish service. A \$29.95 per month tier and a college basketball game package were ordered. At that time, a rebate was available for those who purchased a new DSS dish and at least the \$29.95 package for a year (although pre-payment was not required).

On or about July 1, 1997, the dish no longer worked. In the course of several telephone calls to Hughes customer service, which required waits in excess of an hour each time to talk to yet someone different who knew nothing of the problem, Hughes tried to suggest that the problem was with the Sony receiver; then stated that they could do nothing because their computer system was inoperative; then took the position that the card could not be authorized by Hughes because it once had been authorized through Hubbard for another owner. Furthermore, Hughes stated the position that it could not send a replacement because Hubbard had first authorized the card, even though the undersigned has never done business with Hubbard.<sup>5</sup>

However, it was stated by Hubbard's personnel that *if a thirty five dollar fee would be paid, a new card could be sent*. Somehow, according to Hughes personnel, payment of a thirty five dollar fee to Hubbard, with whom the

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Choice" programming package and the new dish rebate.

<sup>5</sup>If the statements of Hughes that the card was previously authorized are correct, it would appear that the card must have been authorized by the purchaser who returned the unit, although at the time the unit was purchased, the retailer stated that the card had not been authorized.

undersigned has never ordered or done business<sup>6</sup> would result in a new access card being sent by Hubbard that Hughes would then authorize and program. Hughes claimed to be contractually prohibited from sending an access card.

In view of the fact that Hughes has been pre-paid for a full year of service, only half of which has expired, and Hughes was sufficiently satisfied with the access card in January to accept pre-payment for the year's service, a mid-year demand that the user pay a thirty-five dollar fee to get service re-established when it never should have been interrupted is just not acceptable.

The curious result is that although Hughes customer service representatives acknowledge that only one half of a full year's pre-paid service has expired, Hughes customer service personnel state that Hughes can not issue a new access card to restore service because USSB's records reflect that the access card involved was authorized by USSB and that once either has authorized an access card, the other will not issue an access card.

Hughes and USSB should be competitors in the direct broadcast satellite business. Instead, they have combined their technical facilities under agreements, that at least according to Hughes customer service personnel, result in the absurd situation described above with the result that after over two weeks of efforts,

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<sup>6</sup>When the DDS was activated with Hughes program, Hubbard provided a "complimentary" one month subscription to certain programming services.

with several telephone calls of several hours duration, service is still not restored.<sup>7</sup>

The situation is clearly anti-competitive and the public interest is not served by it. Authorization of additional frequencies to Hughes/USSB would clearly exacerbate the ability of Hughes/USSB to whip-saw customers into accepting terms of service that are wholly advantages to Hughes and/USSB. Therefore, assignment to Hughes/USSB of additional facilities would be contrary to the public interest, convenience and necessity.

**II. THE JOINT OPERATION HAS ENGAGED IN DECEPTIVE BUSINESS PRACTICES.**

Hughes' The Total Choice<sup>TM</sup> package (the "Package") was widely promoted when the undersigned purchased the new DSS system. A copy of the booklet touting the Package, which was made available by Hughes to retail outlets for distribution to potential customers, such as the undersigned, is annexed hereto as Exhibit One.

Included in the Package, according to the promotional literature, are "7 channels of movies form ENCORE..." Indeed, when service was commenced, the seven Encore channels were provided as part of the Package. After the full year

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<sup>7</sup>Hughes personnel finally agreed to send a new access card, without charge. However, to date the card has not arrived, although if it had been sent when Hughes said it was sending it under normal 3 day mail service it should have arrived a long time ago. Moreover, the customer service supervisor that stated a new card would be sent has not fulfilled his commitment to call to check up on the card status. Even if the card does arrive, long waits on hold and further retelling of the problems will be necessary to get the access card activated.

had been pre-paid in January, 1997, in approximately March of 1997 Hughes announced that the Encore channels would, effective approximately April, 1997, become premium channels for which an extra charge would be required. Even those, such as the undersigned who had prepaid for a year full of the Package were not accommodated with continuation of the 7 Encore channels through the pre-paid term.

Several calls to Hughes customer service produced only a response to the effect that in its promotional literature Hughes reserves the right to change programming.

If programming line-ups were incidental to the product being ordered, perhaps such a disclaimer (and provision of equivalent services) might satisfy the minimum legal obligation of the contract between the customer and Hughes. However, the programming is not incidental; rather it is central to the decision of a citizen to purchase a DSS dish. Thus, Hughes/USSB should fulfill the programming arrangements that they have made with customers. Hughes action in dropping the seven Encore movie channels seriously degraded the Package and deprived customers of that for which they had contracted with Hughes and, in the cases of pre-paid service, paid for. Thus, even if Hughes' stated position that its promotional materials reserved to it the right to change services in the Package were correct, it would still be unfair to consumers for Hughes to be able to unilaterally delete channels where the service has been pre-paid.



Further, it does not appear that Hughes position that its promotional materials for the Package reserved to Hughes the claimed right to change components of the Package. Review of a copy of the promotional booklet (Exhibit One) discloses no such disclaimer. Thus, at the time the agreement for a one year pre-paid package was entered into, customers would not have been alerted by the promotional material to the claimed reservation of rights to alter programming in the package. As discussed above, where, as here, programming is the central item of negotiation, the cavalier attitude of Hughes that it can change or delete programming at will without regard to pre-paid subscriptions should not be countenanced.

Sadly, in view of the stated refusal of Hughes to restore the deleted programming to the Package (at least for pre-paid subscriptions), action against Hughes by the Commission apparently will be required.

The ability of Hughes to whip-saw customers into accepting its terms is manifestly greater than it would otherwise be because of Hughes' relationship with USSB. A dissatisfied customer may not terminate one and get the same programming services from the other. Thus, the anti-competitive nature of the Hughes-USSB relationship magnifies the ability of Hughes and/or USSB to deal unfairly with consumers.

### **III. THE JOINT OPERATION HAS ARBITRARILY DISCONNECTED PRE-PAID SERVICE.**

As discussed above, Hughes has terminated service of the Package to the undersigned without notice or opportunity for discussion, even though the

Package had been paid fully for the year 1997. Although hours have been spent on the telephone trying to get Hughes to cure the problem, and Hughes (after it and USSB tried to leverage the situation into a payment of a \$35 fee) did indicate that a replacement access card would be sent the following day, it has not been received; nor has anyone from Hughes made a follow-up telephone call which had been promised.

**IV. BY THEIR CONDUCT, THE JOINT OPERATORS HAVE DEMONSTRATED THAT THEY CAN NOT BE RELIED ON TO OPERATE IN THE PUBLIC INTEREST.**

The only reason that the access card, which had been in use successfully for six months apparently can not be reactivated by Hughes stems from Hughes agreements with USSB, according to the statements of Hughes customer service personnel. This is significant evidence of the deleterious effect of the Hughes/USSB agreements. The public is not well served by them and they are not in the public interest.

Moreover, the refusal of Hughes to supply programming for which it solicited and accepted subscriptions as part of the Package for the term of the Package for which it has accepted advance payment is contrary to the public interest. If DBS is to flourish and compete with cable television services, as the Commission and Congress intend, customers must be able to depend on the provider to supply that programming which it has agreed to provide, under the agreed terms and for the agreed length of the pre-paid subscription.

Hughes has proven that it can not be depended on to keep its word and deliver programming for which it has sold subscriptions. Its operation is not in the public interest and assignment to Hughes and its system-mate, USSB, of more spectrum would clearly not be in the public interest.

**V. ANY ADDITIONAL SPECTRUM AUTHORIZED SHOULD BE ASSIGNED TO ANOTHER LICENSEE FOR A COMPETITIVE SYSTEM.**

Were the Commission to allocate additional spectrum or orbital locations for DBS, the spectrum or locations should be assigned to a competitive entity, rather than Hughes or USSB (or a related entity). Moreover, Hughes and USSB should be prohibited from entering into any agreement with the licensee of any new facilities or with any program supplier where such agreement would prevent the licensee of new facilities from obtaining the same programming that is carried by Hughes/USSB.

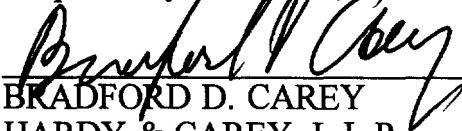
**VI. CONCLUSION: REQUESTS OF HUGHES/USSB FOR MORE SPECTRUM SHOULD BE DENIED.**

Hughes/USSB has entered into an agreement of combination of services, through which competition has been minimized to the extent that, according to their customer service personnel, if one claims to have first validated an access card for a subscriber, the other is prohibited from authorizing an access card for the subscriber, even if the card is wrongfully de-activated during a pre-paid subscription. Attempts to leverage the customer into paying re-activation fees, though the customer has done nothing wrong, have been made. And, even before the service was wrongfully turned off, seven movie channels, together a major component of the programming Package that had been sold -- and for which

advance payment for a year had been accepted -- had arbitrarily been deleted from the pre-paid Package with only about 1/4 of the life of the Package pre-paid period expired.

Moreover, Hughes/USSB operate "customer service" phone systems that make those of cable operators in the worst of days (bygone) seem consumer friendly. Literally, hours must be spent on hold, only to be transferred which starts a new waiting period so that the call can be transferred again. Unfortunately, for all of those hours on hold, no positive outcome seems to occur. No "make good" with programming substitution (or even credit) was offered when the seven movie channels were removed and hours were spent on hold to seek redress. Worse, weeks after the service was wrongfully de-activated, although many hours were spent on the phone with Hughes/USSB over three days, and notwithstanding their ultimate agreement to that day mail a new access card, to date nothing has been received. The service, pre-paid for a year, is non-functional; except Hughes/USSB is able to activate the message light on the receiver and store messages -- to promote programming that can't be received because of the lack of a validated access card. The Commission should deny these operators more frequencies.

Respectfully submitted,

  
BRADFORD D. CAREY  
HARDY & CAREY, L.L.P.  
111 Veterans Memorial Boulevard  
Suite 255  
Metairie, Louisiana 70005  
(504) 830-4646

**CERTIFICATE OF SERVICE**

I, Mary Vance, a secretary in the law firm of Hardy & Carey, L.L.P., do hereby certify that a copy of the above and foregoing Opposition to Allotment and Petition to Deny has been served on the following by mailing a copy of same via U.S. Mail, postage prepaid, this 18th day of July, 1997, addressed as follows:

Gary M. Epstein  
Latham & Watkins  
1001 Pennsylvania Avenue, N.W.  
Suite 1300  
Washington, D.C. 20004-2505

  
\_\_\_\_\_  
Mary Vance

## **EXHIBIT ONE**



DIRECTV. It's Personalized TV.

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Channel Lineup .....	Back Cover



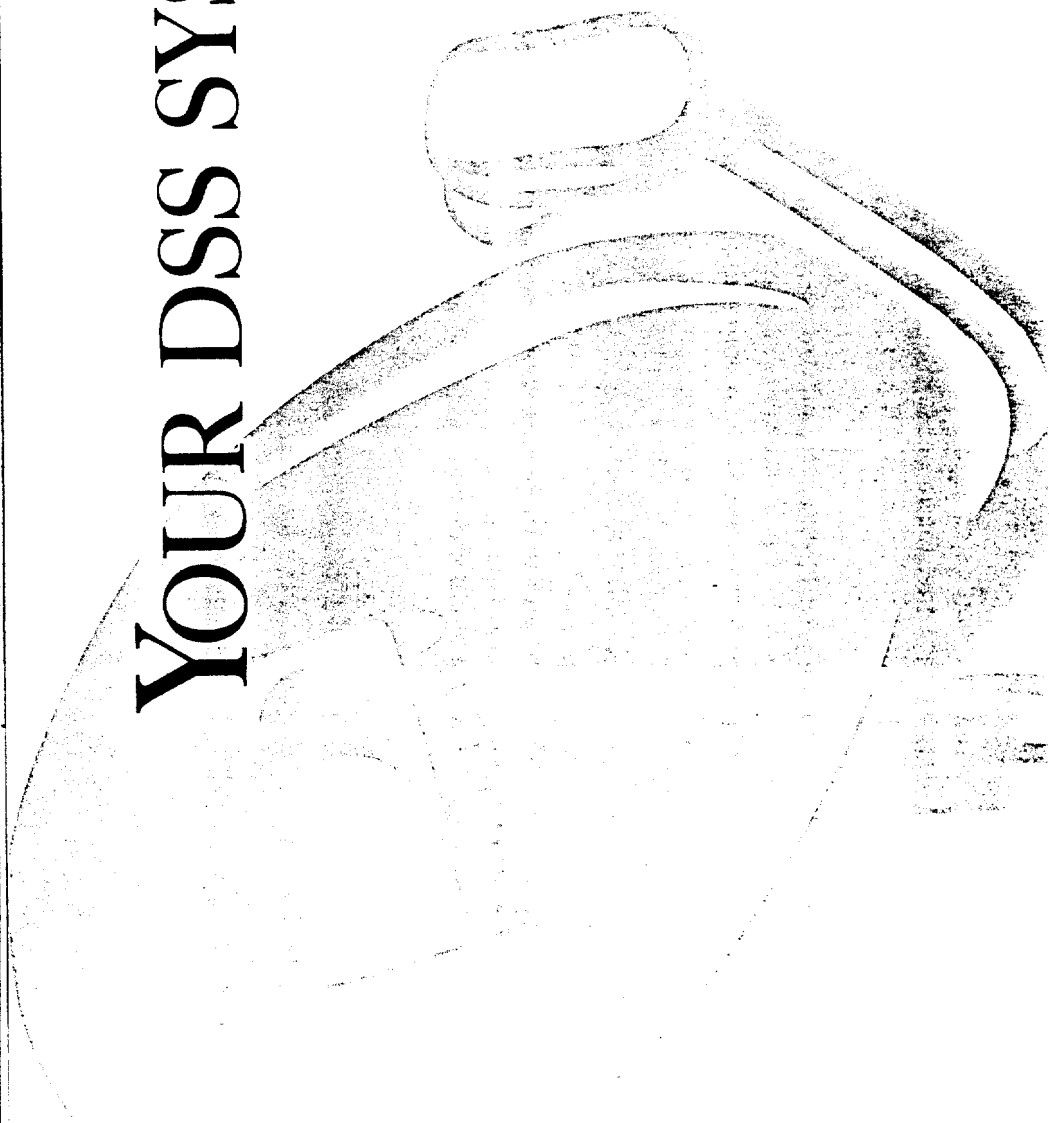
Congratulations! And welcome to a whole new world of home entertainment. With your new DSS system and your DIRECTV programming subscription, you've entered an experience we call "personalized TV." You'll find hundreds of movies, sports, popular cable networks, special events, music and specialty programs—all delivered digitally for the best picture and sound your TV can provide, and all at a terrific price!

But "personalized TV" is more than just great selection at a great price. Not only is there always something worth watching on DIRECTV, you can actually order pay per view movies and events instantly, set parental controls, build lists of your favorite channels, choose from a variety of packages and much, much more!

We know you want the very best in home entertainment, and that's what your DSS system and DIRECTV will bring you: more channels, more variety and more convenience than any other small dish service. So sit back, relax, and get ready to enjoy all of the great entertainment that DIRECTV has to offer!

**You can subscribe to DIRECTV or add great entertainment options today!  
Call our Customer Service Center at 1-800-531-5000 or contact your local service provider.  
For commercial establishments, please call 1-800-226-4DTV.**

# YOUR DSS SYSTEM



The DSS system consists of an 18-inch satellite dish, digital receiver and remote control. Like a television set, your DSS system has power on/off and channel up/down controls. But it also offers many other capabilities that allow you to customize your viewing experience like never before. Although some features may vary depending on the brand of DSS equipment you've purchased, every DSS system brings you great DIRECTV entertainment and all of these exciting features:

Remote Control—allows you to easily move through the on-screen program guide, select your programs, instantly order Direct Ticket™ Pay Per View movies and events, and access the other features of your DSS system.

On-Screen Program Guide—provides listings, rating information and available descriptions about current and upcoming programs.

Locks And Limits—allows you to set parental controls, such as rating and per-program spending limits, or even restrict access to specific channels.

Favorite Channel Lists—lets you build lists of your favorite channels for fast and easy access.

Alternate Audio—selects an alternate language (when available) for individual programs.

Messages—allows you to receive special electronic mail messages from the DIRECTV Customer Service Center.

**Be sure to check the operating manual supplied by  
your DSS manufacturer for detailed information on how to use these  
and other DSS system features.**

**Your  
Best Value!**

# TOTAL CHOICE

The Total Choice™ package gives you your best entertainment value. Total Choice provides twice as many channels as any other DIRECTV programming package. And just compare it to cable! You get more than 40 of your favorite networks, 29 channels of commercial-free, digitally-delivered audio from Music Choice™, plus you can access up to 60 more channels of pay per view movies and events on Direct Ticket! Here's just a sample:

## CABLE FAVORITES

Your monthly subscription brings you some of the most popular cable networks, plus channels that you often won't find on cable systems.

Popular  
Channels  
Like



2 versions of The **Disney** Channel  
© Disney

New  
Channels  
Like



**7** channels of  
movies from

ENCORE

with themes

such as

westerns, mysteries,  
action, true stories and  
drama, love stories and  
children's programming.



## SPORTS

The Total Choice package also includes a great selection of pro and collegiate sports. Enjoy the incredible sports action broadcast on a regional sports network in your area.

No sports lineup  
would be complete  
without



the leader in cable  
sports coverage!

We've also  
added ESPN2,  
a new 24-hour,  
sports-only channel from ESPN  
specially designed for the younger  
sports fan, with exciting up-and-  
coming sports, plus pro hockey action.



All the great sports on your  
cable channels.



## MUSIC

Whether it's audio-only or music video you're looking for, digital delivery brings you sound quality that makes DIRECTV music something to sing about!

- Get 29 channels of digitally-delivered music in a variety of formats, from Classical to Country to Rock. It's like having your own private CD collection! Connect your DSS receiver to your stereo for maximum listening enjoyment.
- Exciting music videos on

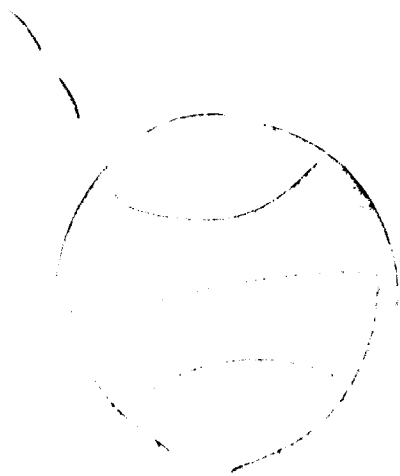


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# BRING HOME THE ACTION!



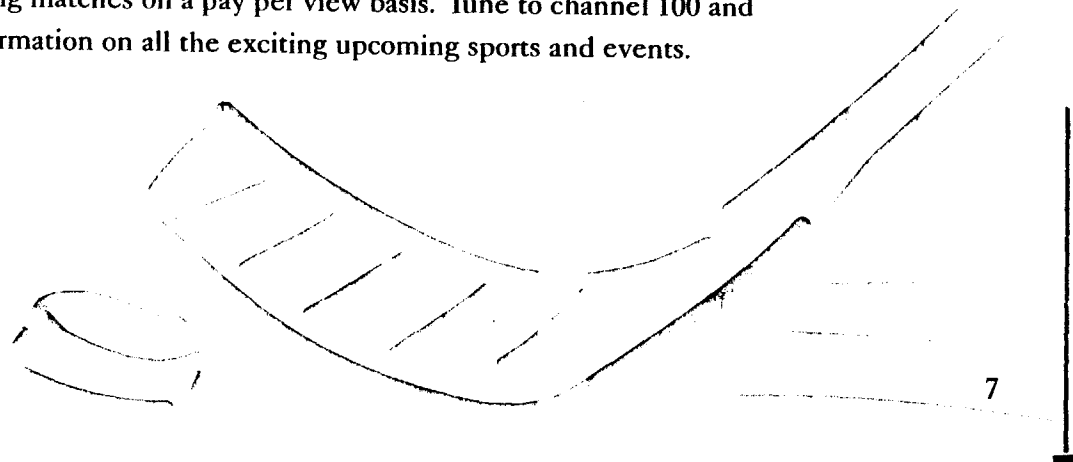
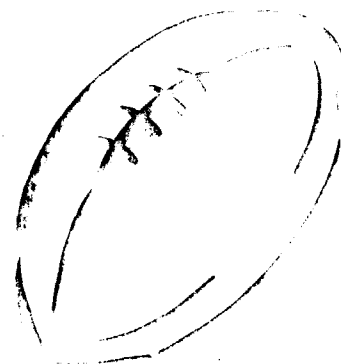
DIRECTV is a sports fan's dream come true! Not only is your Total Choice subscription packed with all of the great sports coverage on ESPN, ESPN2, USA, TNT, TBS, TNN and your local regional sports network, we also offer incredible sports-only packages that bring you a huge variety of pro and collegiate games you probably couldn't get before. Remember, your DSS receiver needs to be *continuously connected* to your phone line to receive these services, and blackout restrictions do apply. But even so, sports fans have never had choice like this before!



## **It's The Ultimate In Sports**

Once you combine your DIRECTV programming package with these special subscriptions, you can have the ultimate sports experience every week during each season!

Plus, Direct Ticket features championship boxing and wrestling matches on a pay per view basis. Tune to channel 100 and 201 for information on all the exciting upcoming sports and events.





**NFL SUNDAY TICKET™**  
Watch up to 13 regular season pro football games each Sunday. That's nearly 200 games a season! Now *you* decide which game to watch!



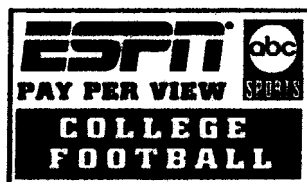
**NBA LEAGUE PASS™**  
See the pro basketball action you used to miss! This out-of-market package brings you up to 700 regular season pro games. Watch as many as 7 games a night!



**NHL CENTER ICE™**  
Ever wish you could see the hockey action playing outside your local area? Now you can. This package brings you over 500 professional hockey games. Don't miss the great regular season NHL action!

**Most of our great packages are not available on cable!**





**ESPN/ABC SPORTS  
COLLEGE FOOTBALL  
SEASON TICKET**

It's the best gridiron action in college football today! Now you can see the top-ranked conferences and teams go head-to-head in intense match-ups that you probably won't find on regular TV in your area. Available on a seasonal or individual weekend basis.



**DIRECTV SPORTS CHOICE™**  
Get terrific out-of-market coverage of collegiate sports, plus boxing, tennis, golf, soccer, volleyball, horse racing and more! Includes regional sports networks from across the country, both Prime Sports and SportsChannel™, and the sensational NewSport Channel, featuring 24-hour on-screen score updates, highlights of games in play, and the latest breaking sports news and information.

**For pricing information and to order sports packages,  
call DIRECTV Customer Service at 1-800-531-5000.**